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The Principle of Proportionality in International Law: Foundations and Variations

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Abstract

Originally based upon the principle of equity, proportionality is predominantly used in the field of human rights protection, the use of force and countermeasures, humanitarian law, maritime boundary law, trade law and investment protection. The article finds that components of proportionality are shared and variably applied in these areas. The main challenge relates to weighing and balancing of interests in judicial review, reflecting upon the varied status and authority of international tribunals. The article submits that proportionality or necessity in terms of assessing the relationship of means and end, seeking least intrusive measures, is well-established and qualifies as a self-standing rule of customary international law. It should be termed strict proportionality. However,

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the component of weighing and balancing interests amounts to a general principle of law and applies in context. It informs the interpretation of the law at hand and is subject to varying standards of review.

Keywords

equity – balancing interests – customary international law – general principle of law – necessity – proportionality – standard of review

1 Introduction

All legal systems, in one form or another, share the basic tenet that the law should respond to facts of life in a measured way and reasonable manner. Law should be suitable to address the issue and should not transgress what is needed to meet the objective envisaged. It must do justice to the case at hand.[1] In the Roman Judean tradition of European and western law, the basic tenet is rooted in equity and distributive justice.[2] It developed into principles of necessity and proportionality in domestic law. The German legal tradition in particular has developed a principle of proportionality in public law entailing three components.

Under the sub-principle of fitness or suitability, it is established whether a specific measure taken by the government is suitable for a legitimate government purpose. Under the sub-principle of necessity, the question raised is whether there are less intrusive means at hand to achieve the purpose of the measure. The principle of necessity requires that no measure less restrictive, which is equally effective, is available. Finally, under the sub-principle generally termed proportionality *stricto sensu*, it is evaluated whether a measure overall is excessive, attributing relative weight to each component of the principle involved, therewith taking into account all available factors and preventing unreasonable results.[3] It is important to stress, however, that the three

1 Ralph A Newman (ed), *Equity in the World's Legal Systems: A Comparative Study* (Etablissements Emile Bruylant 1973).

2 cf Emily Crawford, 'Proportionality' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol VIII (2012) 533 (hereinafter EPIL).

3 Bernhard Schlink, 'Proportionality' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) <www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199578610.001.0001/oxfordhb-9780199578610-e-35> accessed

components are not applied in a mechanical, text-book manner, but rather provide the basis for balancing different components and aspects at stake under the facts of a particular case. According to Alexy, '[T]he greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other'.[4]

Proportionality has also found its way into international law, albeit it is not generally recognized. The canon of general principles of law applicable in international law does not normally include references to proportionality, contrary to the notions of equity, the protection of good faith, legitimate expectations or protection from retroactive application and other legal principles generally recognized in domestic law and main legal systems.[5] Equally, proportionality has generally not been considered to be part of the general principles under customary international law (except for use of force in self-defence and humanitarian law), again, contrary to sovereign equality, self-determination, non-intervention, the prohibition of use or threat of force, or permanent sovereignty over natural resources. Proportionality, however, may achieve such status in coming years and decades beyond a general principle of law recognised in essence by main legal systems. Its importance in adjudication is increasing, but the legal status in international law is unclear.[6] It remains to be seen whether proportionality is suitable to operate as a self-standing principle in its own right, as forcefully advocated by the late Thomas Frank,[7] or whether it merely operates in the context of particular fields of international law and under different names and in disguise.

The three-step test developed in domestic law entails considerable powers in assessing suitability, necessity and appropriateness of state conduct. Yet, it is far from clear whether it is suitable for application comprehensively to all fields of public international law. The article assesses the role of proportionality in selected areas of public international law, mainly focusing on the areas of trade and investment in international economic law, upon briefly recalling the well-established role of proportionality in human rights protection.

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23 March 2017; Pierre Tschannen, Ulrich Zimmerli and Markus Müller, *Allgemeines Verwaltungsrecht* (Stämpfli Verlag AG 2009) 152.

4 Robert Alexy, *A Theory of Constitutional Rights* (OUP 1986) 102.

5 cf Giorgio Gaja, 'General Principles of Law' in IV EPIL (n 2) 370.

6 cf Crawford (n 2) 534; cf also Robert D Sloane, 'On the Use and Abuse of Necessity in the Law of State Responsibility' (2012) 106 AJIL 447–508, 504–07.

7 Thomas M Franck, 'On Proportionality of Countermeasures in International Law' (2008) 102 AJIL 715 and Thomas M Franck, 'Proportionality in International Law' (2010) 4(2) Law & Ethics of Human Rights 229.

We look into the classical domain of sanctions and reprisals in response to violations of international law. We assess the role of proportionality in the law of the sea, and mainly in the law of multilateral trade regulation of the World Trade Organization and particularly in the field of bilateral investment treaty protection where proportionality plays an increasing role. We primarily look into recourse to proportionality by arbitral tribunals and courts, seeking for evidence. We are interested to learn whether there are differences in applying proportionality to different fields of international relations.

We are also interested to explore whether proportionality assumes the same or different roles in horizontal and vertical relations of States. The former depicts configurations of classical international law of co-existence and cooperation, while the latter addresses the status of individual persons, both natural and juridical, in international law. We are interested to learn how proportionality operates in mixed constellations entailing both vertical and horizontal relations, in particular in WTO and investment law. In doing so, we examine the role of proportionality in the gradual process of constitutionalization of public international law.[8] And we are interested to explore the impact of the doctrine of multilevel-governance in explaining and understanding the role of proportionality in international relations.[9] It will be seen that proportionality applies in one form or the other to all the fields examined. Challenges and difficulties encountered essentially lie within the scope of margins of discretions and the standards of review in assessing proportionality by international courts and tribunals.

2 Proportionality in Human Rights Protection

The field of human rights protection in international law, spearheaded by the European Court of Human Rights (ECtHR) applying the European Convention on Human Rights has, ever since its inception, applied considerations of

8 See Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009); Thomas Cottier and Maya Hertig, 'The Prospects of 21st Century Constitutionalism' (2003) 7 Max Planck YB UN L 261.

9 See generally Simona Piattoni, *The Theory of Multilevel Governance* (OUP 2010). From a trade policy angle see Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart 2011); Thomas Cottier, 'Multilayered Governance, Pluralism, and Moral Conflict' (2009) 16 Ind J Global Legal Studies 647.

proportionality in assessing restrictions of fundamental rights.[10] The Court of Justice of the European Union (CJEU) followed suit in applying human rights in its own jurisdiction, assessing the lawfulness of European Union law and the law of Member States. Here, the concept of proportionality implies a 'means-ends' relationship between the aims pursued by a specific action of the government and the means employed to achieve this end.[11] The same, albeit to a lesser extent, holds true for protection under the United Nations Human Rights Council and its bodies. Restrictions of human rights are assessed on a case by case basis without expressly employing a comprehensive doctrine of proportionality in state practice.[12]

These developments and considerations are inspired by constitutional law; they were imported into international law and thus represent the most recent, advanced and modern trait and tradition relating to proportionality in international law. It is clearly in the protection of fundamental rights in administrative law and, subsequently, in constitutional law where the traditions of proportionality were mainly developed in continental Europe. It is from here that proportionality, based upon its roots in German administrative law, found its way into European and public international law, and back from there into domestic law in European countries.[13] Human rights protection amounts to the epitome of constitutionalization of public international law, as patterns of domestic, administrative and constitutional law travelled. They were adjusted and translated to become applicable to the law of international relations. In the field of human rights, the doctrine of multilevel or multi-layered governance allows drawing a picture of proportionality being applied on all layers

10 See for an extensive analysis Jonas Christoffersen, 'Human Rights and Balancing: The Principle of Proportionality' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 19–51; Jeremy McBride, 'Proportionality and the European Convention on Human Rights' in Evelyn Ellis (ed), *Proportionality in the Laws of Europe* (Hart 1999) 23–36.

11 Catherine Haguenau-Moizard and Yoan Sanchez, 'The Principle of Proportionality in European Law' in Sofia Ranchordás and Boudewijn de Waard (eds), *The Judge and the Proportionate Use of Discretion* (Routledge 2016) 142–59; Francis G Jacobs, 'Recent Developments in the Principle of Proportionality in European Community Law' in Ellis (n 10) 1–22; Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer 1996) 23–24.

12 See Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (OUP 2009) passim.

13 Schlink (n 3).

of governance alike in structurally comparable levels, from local, regional, national, and continental to international levels of governance.[14]

Proportionality evolved as an important ingredient in consistently assessing human rights violations, wherever and on whatever level of governance they occur. In this context, courts regularly apply the principle and its different components. Proportionality is being used to assess whether restrictions and measures affecting human rights appropriately respond to legitimate public interests. The three-tier test of proportionality as developed in general administrative and constitutional law[15] may be found to apply foremost in this field.

The triad of proportionality has increasingly influenced perceptions in restricting fundamental rights throughout Europe and the world, albeit not always to the full extent. For example, citizens in the UK today can find an explanation of proportionality newly introduced in common law based on the interpretation of the Human Rights Act, while it was not a standard term in the common law tradition. According to the latter, the means of pursuing a legitimate objective shall not be excessive, arbitrary or unfair – 'You must not use a sledgehammer to crack a nut'.[16] In the United States, proportionality is used in terms of necessity, short of using the word of proportionality.[17]

The adoption of proportionality in the protection of human rights in different layers of governance alike does not mean that the doctrine is firmly settled or strictly applied. It has remained controversial. It is argued that the allegedly objective process of weighing and balancing of interests inherent to the three-tier test of proportionality[18] runs the risk of avoiding important

14 See John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (CUP 2006); Thomas Cottier, 'Towards a Five Storey House' in Joerges and Petersmann (n 9) 495.

15 See supra text accompanying n 3.

16 The Village Citizens Advice Bureau, 'Interpreting the Human Rights Act' <www.thevillage.org.uk/hrinterpreting.htm> accessed 20 June 2016.

17 Bernhard Schlink, 'Proportionality in Constitutional Law: Why Everywhere But Here?' (2012) 22 Duke J Comp & Intl L 291–302. Writing for a US audience, he concludes: 'The principle of proportionality has had a fantastic career: from a principle of moral philosophy to a legal principle, from a principle of administrative law to a principle of constitutional law. It has been called the ultimate rule of law, and even though there is no such thing as an ultimate rule of law, the principle of proportionality is definitely a rule at which all courts ultimately arrive. Even the US Supreme Court, shy about using the term, when it engages in means-end-analysis, follows the rule in substance again and again.' (footnote omitted).

18 Robert Alexy, 'The Construction of Constitutional Rights' (2010) 4(1) Law and Ethics of Human Rights 21–32.

moral and value judgment and eventually leads to an erosion of human rights protection.[19] At the same time, the balance of power between courts and legislators and the executive branch remains unsettled, as the three-prone test of proportionality implies an intrusive role of courts. A closer examination of the case law of the ECtHR shows that the Court does neither apply necessity (least onerous test) nor suitability, but essentially engages in preserving the essence of rights and balancing interests inherent to the European Convention on Human Rights.

The key issue of proportionality in human rights adjudication amounts to properly balancing the different components of proportionality and defining appropriate judicial standards of review of governmental or legislative action. These standards strongly depend upon the authority of the judicial body and may vary. Domestic constitutional courts enjoy greater authority than international tribunals and thus may engage in stricter standards of review. However, the methodological debate no longer differentiates between domestic and international law in the field of human rights.[20] All levels of governance today share common traits in assessing the impact of the principle of proportionality on human rights protection and on regulatory powers and leeway of legislators in the pursuit of other legitimate policy goals. All levels share the same problem of properly defining standards of judicial review.

Proportionality in the protection of human rights in international law clearly pertains to the vertical dimension of the principle, directly addressing rights and status of private persons. The allocation of powers of different courts, both domestic and international needs to be defined in the context of multilevel governance. In defining appropriate standards of review and margins of appreciation, the complementary roles of national and international courts need to be defined. In the field of human rights this amounts to the main challenge, much more than recognising and applying the principle of proportionality and its components as such. This is different in classical areas of public international law addressing horizontal relations among States.

19 For a comprehensive analysis see Jonas Christoffersen, *Fair Balance, Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Brill 2009); Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 ICON 468. See also Jonas Christoffersen and Mikael R Madsen, *The European Court of Human Rights Between Law and Politics* (OUP 2011).

20 See Steven Greer, 'Constitutionalizing Adjudication Under the European Convention on Human Rights' (2003) 23(3) Oxford J Leg Stud 405.

3 Proportionality of Countermeasures

Turning to horizontal relations among sovereign States, the history and role of proportionality is significantly different from its constitutional function in human rights protection. It is primarily related to the use of force. From here, it shaped – subject to specific trade rules – the lawfulness of measures also taken in response to other illegal action in terms of retorsion and reprisals (countermeasures).

States today are basically obliged to refrain from threatening, or using, force against the territorial integrity or political independence of any other State in their international relations.[21] The obligation is recognized to constitute a principle of customary international law.[22] It is universally binding and codified in Article 2(4) of the Charter of the United Nations. According to customary law and Article 51 of the UN Charter, the obligation to refrain from force does not however affect the right of a State to defend itself against armed attacks, including impending attacks, until the Security Council has taken the measures necessary to maintain peace and security.[23] In this context, the principle of proportionality is of paramount importance in assessing the lawfulness of recourse to measures in response to illegal measures, in particular unlawful use, or threat, of force in international law.

Since the establishment of the UN Charter, it has been accepted that there are essentially three retaliatory forms of lawful recourse to violations of international law: (i) retorsions,[24] (ii) reprisals (now usually termed countermeasures),[25] and (iii) self-defence.[26] All these forms of state responses are traditionally deployed in a horizontal manner between States,[27] subject to qualifications in state practice and arbitration which are mainly expressed in terms of necessity *and* proportionality.

Reprisals – or countermeasures – and self-defence must fulfil certain preconditions to be legitimate beyond an established violation of law. Retorsion –

21 See Nikolas Stürchler, *The Threat of Force in International Law* (CUP 2007).

22 Malcolm N Shaw, *International Law* (7th edn, CUP 2014) 814–15.

23 See ibid 820 with reference to the *Caroline affair*, upon which the *Caroline test* for assessing the necessity of preemptive use of force for self-defense was developed ('instant, overwhelming, and leaving no choice of means, and no moment for deliberation').

24 Thomas Giegerich, 'Retorsion' in VIII EPIL (n 2) 976.

25 See Shaw (n 22) 819; Matthias Ruffert, 'Reprisals' in VIII EPIL (n 2) 927.

26 See Shaw (n 22) 818–31 for an in-depth analysis of the three forms.

27 For self-defence against attacks by non-state actors see Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 AJIL 770.

e.g. diplomatic or/and economic restrictions – while lawful and not interfering with the rights of the targeted State, is nevertheless subject to the prohibition of abuse of rights. Precondition for self-defence is not only the use of force, but an armed attack, actual or impending. Responses are subject to the concepts of necessity *and* proportionality. As Shaw points out, '[they] are at the heart of self-defence in international law'.[28] It is here that the principle of proportionality finds its *locus classicus* and point of departure in international law of coexistence. Interestingly, it first entered international law by the application of the principle of equity by international tribunals.

3.1 *Foundations of Proportionality in Equity and Humanity*

In the *Naulilaa Arbitration* between Portugal and Germany in 1928, for the first time a Tribunal held that there was no applicable law of nations dealing with the legitimacy of reprisals of States.[29] It therefore decided to fill the gap by consulting the principles of equity in analogy:

> Enfin, à défaut de règles du droit des gens applicables aux faits litigieux, les arbitres estiment devoir combler la lacune, en statuant suivant les principes d'équité, tout en restant dans le sens du droit des gens, appliqué par analogie, et en tenant compte de son évolution.[30]

The next step taken by the Tribunal was to give the now classic definition of reprisals and the various elements to be taken into account. A reprisal constitutes a lawful act of an injured State, only if it takes place in response to a prior violation of international law and after peaceful negotiations have been unsuccessful. It is illegal without prior violation of international law.[31]

The Tribunal stressed that the reprisal is subject to humanity and that the rules of good faith are applicable in relations between States. The definition did not specify whether the act of self-defence needs to be proportionate to the

28 Shaw (n 22) 827 with further references.

29 *Responsabilité de l'Allemagne à Raison des Dommages Causés dans les Colonies Portugaises du Sud de l'Afrique* (*sentence sur le principe de la responsabilité*) (*Portugal v Germany*), 8 Trib Arb Mixtes 409 (The Naulilaa Arbitration), reprinted in (1949) II UNRIAA 1011. An early precursor was the 1837 Caroline incident where it was argued before the UK Parliament that local authorities 'even supposing the necessity of the moment … did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.' Parliamentary Papers 202, quoted from Crawford (n 2) 535.

30 Shaw (n 22) 1016.

31 ibid 1026.

original unlawful act or not. A prohibition of abuse of the right was introduced, taking into account the experience of the First World War. The Tribunal decided that even if proportionality to the original unlawful act was not required by the law of nations, reprisals should certainly be considered as excessive and therefore unlawful when they are *out of all proportion* to the act that motivates them.[32]

While the roots and origin of the principle of proportionality remain controversial in the literature,[33] recourse to equity was a convincing manner to introduce concepts not explicitly codified in positive international law at the time. We shall return to comparable roots in discussing the law of the sea.

3.2 *Proportionality in the Use of Force*

The International Court of Justice (ICJ) dealt with the question of self-defence for the first time only in the 1986 *Nicaragua* case.[34] Before examining the specific measures at hand, the Court stated that the 'Parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.'[35] First the Court pointed out that US assistance to the 'contras' as well as the mining of Nicaraguan ports and attacks on ports, oil installations and the more by the US had been unlawful because there had been no armed attack on the part of Nicaragua against El Salvador. It nonetheless continued to examine whether the US measures would have been deemed necessary and proportionate, had they been lawful in the first place. The Court noted that the US actions took place 'long after' the opposition against the government of El Salvador had stopped and concluded that the components of necessity and proportionality were absent in this case.[36]

The Court summarized its findings that even assuming the acts of which Nicaragua was accused, were established by and imputable to that State, they could only have justified proportionate counter-measures on the part of the State which had been the victim of those acts. They could not justify countermeasures taken by a third State, and could in particular not 'justify intervention

32 ibid 1028.

33 For an overview of diverging opinions see ibid 75–77.

34 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14. For a detailed account see also Frank (n 7).

35 *Nicaragua* case (n 34) 103, para 194.

36 ibid para 237.

involving the use of force.'[37] Note that the standards applied transgress the Naulilaa standards of avoiding action merely out of all proportions.

In 2003, in the *Oil Platforms* case, the ICJ reaffirmed the requirement of necessity *and* proportionality as two distinct requirements.[38] Only an armed attack in the responsibility of a State makes a measure of self-defence necessary. In addition, the measure needs to be proportional to the armed attack in terms of means and timing. 'One aspect of the criteria of necessity and proportionality is the nature of the target of the force used avowedly in self-defence' (legitimate target).[39] In the case at hand, the US launched a sequence of military action in 1988 against Iranian vessels and aircraft as well as two Iranian oil platforms, allegedly serving military actions called the 'Operation Praying Mantis'. The ICJ found that neither the sequence as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, could be regarded, in the circumstances of the case, as a proportionate use of force in self-defence'[40] and that these actions could not 'be justified as measures necessary to protect the essential security interests' of the US.[41]

In 2005 the Democratic Republic of Congo claimed to have been attacked by armed Ugandan forces in the *Congo* case.[42] Uganda in response pleaded self-defence against attacks from the Allied Democratic Forces for the Liberation of the Congo (ADF). As the ICJ was not satisfied that any attack had emanated from armed forces of the Congo, it denied Uganda the right to self-defence. It again seized the opportunity of observing that the measures taken – in particular 'the taking of airports and towns many hundreds of kilometres from Uganda's border' – would neither seem proportionate nor necessary.[43]

In the case law of the ICJ, self-defence is clearly restricted to measures that are necessary *and* proportionate. To qualify as necessary, an armed attack from a State must have taken place and to qualify as proportionate, the self-defence should not exceed what is necessary to fend off the attack. The rights of the

37 ibid para 249. In addition to the already mentioned preconditions for self-defence, the collective self-defence rests upon two additional criteria – explicit declaration by the state-victim about an armed attack and assistance request directed to a third state –, which were not met in this case, see ibid paras 195–99.

38 *Case Concerning Oil Platforms* (*Islamic Republic of Iran v United States of America*), [2003] ICJ Rep 161, 183, para 43.

39 ibid para 74.

40 ibid para 77.

41 ibid para 125.

42 *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) [2005] ICJ Rep 168.

43 ibid para 147.

Security Council to take measures necessary to maintain international peace and security remain reserved.[44]

It is thus well established in case law that the right of States to self-defence is subject to the principles of necessity and proportionality.[45] This was explicitly recognized by the ICJ. Upon request of the General Assembly of the United Nations, the ICJ rendered an Advisory Opinion on the Legality of the *Threat or Use of Nuclear Weapons* in July 1996.[46] After clarifying that the UN Charter is 'the most directly relevant applicable law',[47] it reiterated that '[t]he submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.'[48]

In the literature, the requirement of proportionality is 'almost universally affirmed'.[49] The content and role thereof have however been controversially analysed over the decades.[50] In recent literature the position has been adopted that proportionality should be conceived as a relation between the legitimate aim (self-defence) and the means (force) of an action.[51] After examining whether the means are necessary to achieve the legitimate end, they are deemed subject to a 'narrow proportionality' test which requires an assessment of whether the harm caused by those necessary means is appropriate and reasonable to the aim.[52]

This view is reflected in the Draft Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission, where proportionality requires that 'countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally

44 Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN-Charter) art 51.

45 For a critical analysis of the scope and boundaries of this right see for example David Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum' (2013) 24 EJIL 235 and Bethlehem (n 27).

46 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

47 ibid para 34.

48 ibid para 41.

49 Enzo Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12 EJIL 889 and Kretzmer (n 45) 239, both with further references.

50 Cannizzaro (n 49) 890–91; Kretzmer (n 45) 240.

51 Cannizzaro (n 49) 891; Enzo Cannizzaro, 'Contextualizing Proportionality: *jus ad bellum* and *jus in bello* in the Lebanese War' (2006) 88 International Review of the Red Cross 779, 783.

52 Cannizzaro (n 49) 891; Kretzmer (n 45) 239–40.

wrongful act and the rights in question.'[53] Proportionality, as an instrument for control of the unilateral use of force, means that the countermeasure must correspond to the need to ward off the current attack, and not to the need to produce the level of security sought by the attacked State.[54]

Furthermore, the Advisory Opinion of the ICJ on the Legality of the *Threat or Use of Nuclear Weapons* emphasized that even a use of force which is proportionate under the law of self-defence – *jus ad bellum* – 'must, in order to be lawful, also meet the requirements of the law applicable in armed conflict – *jus in bello* – which comprise in particular the principles and rules of humanitarian law.'[55]

According to the Court, one of the core principles constituting humanitarian law is based on the distinction between combatants and non-combatants, aiming at the protection of the civilian population. The civilian population is never to be an object of attack, and the use of weapons which does not, and cannot, distinguish between combatants and non-combatants is banned. Another principle prohibits causing unnecessary suffering to combatants and civilians.[56] The prohibition of weapons that do not meet these requirements of humanitarian law can thus be seen as a reflection of the principle of proportionality. After a detailed examination of humanitarian law, however, the Court was unable to 'reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.'[57]

In conclusion, the classical body of international law in the fields of self-defence, armed intervention and warfare essentially focuses, founded upon equity, on the principles of necessity *and* proportionality. The examination is not limited to assessing the relationship of means to an end, but also whether the necessary countermeasure is appropriate and reasonable in relation to the harm suffered. It does not seem to include an examination of the requirement of suitability and fitness which is assumed. What exactly is deemed necessary and proportionate depends on the circumstances of the concrete case, possibly even including the consideration of the type of weaponry used.[58]

53 ILC, 'Responsibility of States for Internationally Wrongful Acts' (2001) art 51, UN Doc A/56/10.

54 Cannizzaro (2006) (n 49) 785.

55 *Legality of the Threat or Use of Nuclear Weapons* (n 46) 245, para 42.

56 ibid para 78.

57 ibid para 97.

58 See Shaw (n 22) 827–28 with numerous further references.

4 Proportionality in Maritime Boundary Delimitation

A particular aspect of territorial sovereignty of States – against which States are obliged to refrain from threatening or using force – are the different maritime zones (coastal waters, continental shelf, Exclusive Economic Zone) pertaining to coastal States and the need to delineate them between adjacent and opposite States. As maritime boundary delimitation affects at least two countries, delimitation must be based on peaceful settlement among all the States involved. In cases where they are unable to arrive at an agreement, courts must be called upon since unilateral determination is excluded between adjacent and opposite coastal States. Again, equity was at the heart of introducing considerations of proportionality in allocating marine spaces to coastal States, entailing the employment of equitable principles, relevant circumstances and factors, including a proportionality test.[59]

4.1 *Foundations of Proportionality in Equity*

In 1969, in the *North Sea Continental Shelf* cases,[60] the ICJ was requested to state the rules and principles of international law applicable in a dispute related to the delimitation of the continental shelf.[61] The Court decided two cases in a single judgment, one between Germany and the Netherlands and the other between Germany and Denmark. Most of the delimitation had been agreed upon by the parties. The Court was called upon to decide between the equidistance principle (supported by Denmark and the Netherlands) and proportionality to the coastline (Germany) in order to set the rest of the boundaries.[62]

After concluding that the parties were under no obligation to apply the equidistance principle, neither under treaty nor customary law,[63] the Court explained, it was not called upon to delimit the areas itself, but indicated to

59 For a detailed analysis see Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: Legal Foundations and Methodology* (CUP 2015); Shaw (n 22) 428–39.

60 *North Sea Continental Shelf Cases* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*) [1969] ICJ Rep 3.

61 Cottier (n 59). Earlier works on this extensive and complex subject include: Robert Kolb, *Case Law on Equitable Maritime Delimitation/Jurisprudence sur les délimitations maritimes selon l'équité, Digest and Commentaries/Répertoire et commentaries* (Brill 2003); Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation, Legal and Technical Aspects of a Political Process* (Brill 2003); Shi Jiuyong, 'Maritime Delimitation in the Jurisprudence of the International Court of Justice' (2010) 9(2) Chinese JIL 271.

62 *North Sea Continental Shelf Cases* (n 60) para 7.

63 ibid para 83.

the parties the principles and rules of law in the light of which they should meet an agreement themselves 'in accordance with equitable principles'.[64] It summarised that it was 'not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles'.[65] It emphasised that there was no legal limit to the considerations to be taken into account 'for the purpose of making sure they apply equitable procedures' and that, more often than not, the result would be produced by balancing-up all of the relevant circumstances such as geological and geographical factors.[66] It finalised its analysis of which principles and relevant circumstances need to be taken into account under the umbrella of equity by including 'the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about'.[67]

4.2 *Controlling for Disproportionate Allocations*

Ten years later, in the *Anglo-French Continental* cases,[68] the Court of Arbitration stated more precisely that it did not consider proportionality to be a general principle to be applied in all cases of maritime boundary delimitation. It recognized that in the *North Sea Continental Shelf* cases there had been a peculiar geographical situation, whilst in the present case the role of proportionality was not linked to any specific geographical feature, but was 'rather a factor to be taken into account in appreciating the effects of geographical features on the equitable or inequitable character of a delimitation.'[69]

The Court continued to state that the concept of proportionality may play a particular role in situations of 'particular configurations of the coast or individual geographical features', but that it more usually appears 'as a factor for determining the reasonable or unreasonable – the equitable or inequitable – effects of particular geographical features or configurations upon the course of an equidistance-line boundary.'[70] It summarised that 'it is disproportion rather than any general principle of proportionality which is the relevant criterion or

64 ibid para 84.
65 ibid para 85.
66 ibid paras 93–94.
67 ibid para 98.
68 *Arbitration on the Delimitation of the Continental Shelf* (*France/United Kingdom*) (1979) ILM 397.
69 ibid para 99.
70 ibid para 100.

factor.'[71] It specified that it was more a question of remedying disproportionality and inequitable effects produced by particular geographical configurations or features, and that the concept of proportionality was not to be used 'as a general principle providing an independent source of rights to areas of continental shelf'.[72]

4.3 *Avoiding Gross Inequities*

Recourse to proportionality – or rather disproportionality – was further developed in subsequent cases of the ICJ and in arbitration. The 2009 Case *Maritime Delimitation in the Black Sea* (*Romania v Ukraine*)[73] offers a succinct summary of the case law till that date and recalls that proportionality merely applies to avoid gross inequities and does not entail a mathematical application of a principle. Upon reviewing a number of precedents, the Court recalled in particular the findings of the Chamber in the 1984 *Gulf of Maine* case, which confirmed that equitable principles 'may be taken into consideration for an international maritime delimitation' in cases of certain geographical inequalities,[74] but found no such disparities in the case at hand.[75]

These and more recent cases demonstrate how the ICJ and arbitration tribunals developed their jurisprudence in the field of maritime delimitation based upon the equitable principles. After ascertaining there is no delimiting agreement in force between the States concerned,[76] the Court performs an examination in three stages. In the 2014 case *Peru v Chile*,[77] the Court reiterated the methodology it usually employs in 'seeking an equitable solution': Firstly, it determines the relevant coasts and base points to be used, and as a rule constructs a provisional equidistance line. Secondly, it takes all relevant circumstances into consideration before it decides whether the provisionally drawn line needs to be modified in accordance of what amounts to an application of equitable principles and relevant circumstances. Finally, it conducts a disproportionality test *ex post*, in which it assesses whether the result is 'markedly disproportionate' to the lengths of the respective coasts.[78]

71 ibid para 101.

72 ibid.

73 *Maritime Delimitation in the Black Sea* (*Romania v Ukraine*) [2009] ICJ Rep 61.

74 ibid para 167.

75 ibid para 168.

76 *Maritime Delimitation in the Black Sea* (n 73) para 197.

77 *Maritime Dispute* (*Peru v Chile*) [2014] ICJ Rep 3.

78 ibid para 180 with further references.

In conclusion, proportionality in maritime boundary delimitation assumes a particular and succinct function in this field of natural resource allocation. Consideration of suitability and necessity are absent from the test. The focus is on broadly assessing whether the results achieved are equitable and not disproportionate in relation to coastal configurations and the landmass of coastal States. Efforts in the 1984 *Gulf of Main* case to apply proportionality more precisely and arithmetically in assessing the length of coast lines and marine spaces allocated are no longer pursued and left behind in a process of trial and error in developing the role of proportionality in the law of maritime boundary delimitation. In a process of trial and error, proportionality has resulted in assuming a minimalist role of avoiding blatant inequity out of proportion which cannot be compared to other areas of public international law. Neither are considerations of necessity of strict proportionality involved. Proportionality in maritime boundary delimitation is proportionality *sui generis*. It is one factor among others considered in applying equitable principles and does not share the characteristics of the triad elements identified under the principle of proportionality. The field shows that proportionality may play a particular role in a particular field of international law and that considerations of necessity are absent.

5 Proportionality in WTO Law

The law of the World Trade Organization (WTO) (as well as preferential trade agreements based upon this body of law) aims at liberalisation of international trade while recognising the sovereign right of its Members to pursue other legitimate objectives and to regulate trade accordingly. The field is of particular interest as it cannot be clearly allocated to either horizontal or vertical relations. While formally a matter between States, WTO law essentially shapes conditions of competition and market access of private companies. It shows a hybrid structure, and it is of interest how this affects the operation of proportionality.

The need to strike a balance between divergent trade interests of Members and also between the trade interest and other legitimate policy goals is implicit to the WTO framework. Proportionality therefore is of inherent importance to international trade regulation in balancing divergent interests at stake.[79] While there is no explicit reference to the principle of proportionality in WTO law, there are several references to notions that either form a part of

79 Peter Van den Bossche, 'Looking for Proportionality in WTO Law' (2008) 35(3) LIEI 284.

proportionality test or fulfil an analogous function. WTO law often resorts to the terms 'necessary', 'less trade restrictive', 'appropriate', which allow the WTO adjudicating bodies to perform the balancing exercise on a case-by-case basis.[80]

We first address proportionality in the justification clauses of Article XX of the General Agreement on Tariffs and Trade (GATT) and of Article XIV of the General Agreement on Trade in Services (GATS). We then turn to the more specific role of proportionality in the SPS and TBT Agreements which do not contain general exceptions clauses and integrate proportionality in the analysis of national treatment obligation and necessity requirement. Emanations of proportionality in WTO law are not limited to these areas. They can be traced throughout the system.[81] Finally, we raise a question as to which role proportionality plays in unilateral and multilateral remedies that are available to WTO Members.

5.1 *Competing Legitimate Policy Goals: Exceptions in GATT and GATS*

An implied reflection of the principle of proportionality can be found both in Article XX GATT and Article XIV GATS.[82] These provisions constitute general exceptions and provide a number of justifications for restrictions of obligations under each of the respective WTO agreements. They are a key mechanism to balance trade and other legitimate interests of the WTO members. Based on the structure of these articles, WTO panels and the Appellate Body essentially follow three steps in their analysis:[83] (i) identify whether the

80 Andrew D Mitchell, 'Proportionality and Remedies in WTO Disputes' (2007) 17 EJIL 987; Axel Desmedt, 'Proportionality in WTO Law' (2001) 4 JIEL 442–43.

81 See for instance arts 2.3, 8.1 and 27.2 of the TRIPS Agreement; art VI:4 and para 2(d) of art XII of the GATS, para 2 of the GATS Annex on Financial Services and para 5(e) of the GATS Annex on Telecommunications; art 23.2 of the Agreement on Government Procurement and art XI GATT.

82 See in particular art XIV(a), (b) and (c) GATS, and art XX (a), (b) and (d) GATT.

83 See generally for the three-step test, Thomas Cottier and Matthias Oesch, *International Trade Regulation* (Stämpfli Verlag AG 2005) 429. For a criticism of the utility of the approach see Petros Mavroidis, *The General Agreement on Tariffs and Trade: A Commentary* (OUP 2005) 213; WTO Committee on Trade and Environment, 'GATT/WTO Dispute Settlement Practice Relating to Article XX, Paragraphs (b), (d) and (g) of GATT, Note by the Secretariat' WT/CTE/W/53/Rev.1 (26 October 1998) para 10. With respect to GATS see Thomas Cottier, Panagiotis Delimatsis and Nicolas Diebold, 'Article XIV GATS: General Exceptions' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *Trade in Services* (2008) 6 Max Planck Commentaries on World Trade Law 292; WTO, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Service*s, Report of the Appellate Body (7 April 2005) WT/DS285/AB/R, para 292; Joel Trachtman,

objective pursued by a WTO member is covered by one of the motives listed; (ii) establish whether the measure employed by the WTO member is indeed necessary to achieve, or relates to, the specific objective pursued;[84] and (iii) check whether the application of the measure bears a rational relationship to the objective pursued under the so-called chapeau element. The first step arguably amounts to the first element of standard proportionality test, namely the suitability of the measure.[85] The second step and third step, as explained below, correspondingly reflect the elements of the necessity and appropriateness requirements.

5.1.1 The Necessity Test

The 'necessity' test in Article XX GATT and Article XIV GATS is not defined in the agreements itself and was mainly developed over time through jurisprudence. In the early GATT cases, necessity was merely tested on the basis of the availability of an alternative, less intrusive measure which a WTO Member could reasonably be expected to employ.[86] This reflected a narrow necessity test limited to the aspect of suitability of the principle of proportionality. The burden of proof demonstrating the availability of less restrictive measures falls upon the complaining party. However, WTO adjudicating bodies subsequently enriched the necessity test under the general exceptions with an additional element. Since *Korea–Various Measures on Beef* and *EC–Asbestos*, the panels and the Appellate Body consequently apply a 'weighing and balancing' test.[87] According to the Appellate Body, determination of necessity includes the 'process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports'.[88]

'International Decisions – United States: Measures Affecting the Cross-Border Supply of Betting and Gambling Services' (2005) 99(4) AJIL 864.

84 Notably, Article XX GATT requires either necessity or relation to the objective pursued.

85 Van den Bossche (n 79) 287; Petros Mavroidis, 'Trade and Environment After the Shrimps-Turtles Litigation' (2000) 34 JWT 79.

86 WTO, *Thailand–Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the Panel (7 November 1990) BISD 37S/200, paras 73 and 75.

87 WTO, *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body (11 December 2000) WT/DS161/AB/R, para 164; WTO, *European Communities–Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body (12 March 2001) WT/DS135/AB/R, para 172.

88 *Korea–Beef* (n 87) para 164.

The Appellate Body further suggested that weighing and balancing contributes to determining whether a WTO Member can reasonably be expected to employ an alternative measure, or whether a less WTO-inconsistent measure is reasonably available.[89] In *Brazil–Retreaded Tyres*, the Appellate Body set out three essential factors: the relative importance of interests, the contribution of the measure to achieve the regulatory goals and the impact on international trade, all to be balanced and weighed under the necessity test:

> The necessity of a measure should be determined through 'a process of weighing and balancing of factors' which usually includes the assessment of the following three factors: the relative importance of interests or values furthered by the challenged measures, the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce.[90]

In the GATS framework, the first case to address the necessity test was *US–Gambling* which established a test equivalent to *Korea–Various Measures on Beef*.[91] The Appellate Body in *US–Gambling* also explicitly mentioned that a reasonable alternative measure has to preserve the responding party's right to achieve its desired level of protection, thus granting deference to the WTO Members' sovereign right to determine the level of protection pursued.[92] In *China–Publications and Audiovisual Products*, the panel and the Appellate Body found in the process of weighing and balancing interests at stake that the US was able to demonstrate that reasonable alternative measures are available to exclusive state trading, and thus the necessity test of Article XX(a) was not met.[93] It is the first and only case so far which met this standard.

5.1.2 Chapeau

The Chapeaus of Article XX GATT and Article XIV GATS require that measures that were found to be necessary or relating to the specific objectives listed therein, 'are not applied in a manner which would constitute a means

89 ibid para 166.

90 WTO, *Brazil–Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body (3 December 2007) WT/DS332/AB/R, para 164.

91 *US–Gambling* (n 83); WTO, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Report of the Appellate Body (21 December 2009) WT/DS363/AB/R, para 319.

92 *US–Gambling* (n 83) para 292.

93 *China–Publications and Audiovisual Products* (n 91) paras 250–311.

of arbitrary or unjustifiable discrimination' or a 'disguised restriction in international trade'. The Appellate Body in *US–Shrimp* suggested that the terms 'unjustifiable', 'arbitrary' or 'necessary' define 'a line of equilibrium' and thus require weighing and balancing along the lines of the proportionality principle. The equilibrium is determined on a case-by-case basis as the facts of each case vary.[94] In *EC–Seals*, the Appellate Body suggested that the weighing and balancing has to take into consideration also the type or cause of the violation and the objectives pursued.[95] The WTO adjudicating bodies in their analysis of the chapeau of Article XIV GATS relied predominantly on existing GATT jurisprudence.[96]

5.2 *Proportionality Under the TBT and SPS Agreements*

Both the Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) operate on the basis of the principle that WTO Members can adopt domestic measures in the pursuit of legitimate public policy objectives. However, such measures must not be more trade-restrictive than necessary. This again entails a process of weighing and balancing of various elements of the divergent interests to ensure that the measures employed by the Members are not excessively trade restrictive in light of the objectives pursued.[97] As these agreements do not refer to general exceptions discussed above, the process essentially takes place in assessing national treatment and necessity in defining appropriate means to the end aspired.

Article 2.2 of the TBT Agreement requires that 'technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create'. In *US–Clove Cigarettes* the Panel suggested that GATT jurisprudence is relevant for the analysis of 'necessity'.[98] This approach was later supported by the panels and

94 WTO, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (12 October 1998) WT/DS58/AB/R, para 159.

95 WTO, *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products*, Report of the Appellate Body (18 June 2014) WT/DS400/AB/R, WT/DS401/AB/R, paras 5.299–5.301. See also Thomas Cottier and others, 'The Jurisprudence of the World Trade Organization in 2014' (2015) 2 SRIEL 249.

96 *US–Gambling* (n 83) paras 338–45.

97 Desmedt (n 80) 424.

98 WTO, *United States–Measures Affecting the Production and Sale of Clove Cigarettes*, Report of the Panel (2 September 2011) WT/DS406/R, paras 7.353–7.369.

the Appellate Body in *US–Tuna II* (*Mexico*) and *US–COOL*.[99] The practice developed by the panels and the Appellate Body in cases on Article 2.2 of the TBT Agreement suggests that the necessity analysis is a 'relational analysis of the trade restrictiveness' based on the assessment of the following factors:[100] (i) trade restrictiveness of technical regulation; (ii) fulfilment of the objective pursued at the level chosen by a Member, which does not entail any minimum threshold and simply refers to a 'degree of contribution to the achievement of objective',[101] and, finally, (iii) the risks of non-fulfilment, with due regard to the importance of the interests and values at stake. Similar to the 'necessity' requirement in Article XX GATT, the panel in most cases[102] has to assess the 'necessity' of the trade-restrictiveness of the original measure by looking at (i) whether an alternative measure is less trade-restrictive; (ii) whether it would make an equivalent contribution to the legitimate objective; (iii) whether it is reasonably available, and, finally, (iv) what risks of non-fulfilment of the legitimate objective exist.

In recent jurisprudence, the Appellate Body also seems to suggest considerations of proportionality under the 'no less favourable treatment' standard in Article 2.1 of the TBT Agreement. Namely, apart from assessing whether the measure modifies the conditions of competition to the detriment of imported products, panels also have to establish whether any detrimental impact reflects discrimination against the imported products,[103] or in other words, whether the detrimental impact stems exclusively from the legitimate regulatory

99 WTO, *United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Report of the Panel (13 June 2012) WT/DS381/R, paras 7.457–7.458, 7.471; WTO, *United States–Certain Country of Origin Labelling* (*COOL*) *Requirements*, Report of the Appellate Bodies (29 June 2012) WT/DS/384/AB/R, WT/DS386/AB/R, para 374.

100 *US–Clove Cigarettes* (n 98) paras 7.356–7.418.

101 *US–COOL* (n 99) para 468.

102 An analysis of the alternative measure is not necessary if the alternative measure is not restrictive, or if the challenged measure does not contribute to the achievement of the legitimate objective. See WTO, *United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Report of the Appellate Body (13 June 2012) WT/DS381/AB/R, para 322 fn 647.

103 *US–Tuna II* (*Mexico*) (n 99) para 231; WTO, *United States–Certain Country of Origin Labelling* (*COOL*) *Requirements*, Report of the Panel (Article 21.5 – Canada, Mexico) (20 October 2014) WT/DS384/RW, WT/DS386/RW/Add.1, WT/DS386/RW, WT/DS384/RW/Add.1, paras 7.60–7.62.

distinction.[104] In doing so, panels have to assess case-specific circumstances, including design, architecture, revealing structure, operation, and application of the technical regulation, and, specifically, whether that technical regulation is even-handed.[105] The introduction of an even-handedness test is seen as an attempt to remedy the absence of Article XX GATT and reflects the rationale of the chapeau.[106]

The SPS Agreement refers to 'necessity' requirements in several of its provisions. Article 2.2 of the SPS Agreement requires that sanitary or phytosanitary measures are applied only to the extent necessary to protect human, animal or plant life or health.[107] Article 5.6 of the SPS Agreement, similarly to Article 2.2 of the TBT Agreement, refers to the 'necessity' of trade-restrictiveness and requires that these measures must be 'not more trade-restrictive than required to achieve the appropriate level of sanitary and phytosanitary protection'. Here the 'necessity' focuses on the alternative measure which (i) is reasonably available, including technical and economic feasibility, (ii) achieves the Member's appropriate level of sanitary and phytosanitary protection,[108] and (iii) is significantly less restrictive to trade than the contested SPS measure.[109] The adjective 'significantly' constitutes a slight shift in the standard in comparison

104 Notably, this additional element has been explicitly rejected as part of the analysis of the 'no less favourable treatment' under Articles II:1 and XVII GATS (see WTO, *Argentina–Measures Relating to Trade in Goods and Services*, Report of the Appellate Body (14 April 2016) WT/DS453/AB/R, para 6.111), and Article III:4 of the GATT (see WTO, *United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Report of the Appellate Body (Article 21.5 – Mexico) (20 November 2015) WT/DS381/AB/RW, para 7.277–7.278; *EC–Seals* (n 95) paras 5.116–5.117).

105 WTO, *United States–Measures Affecting the Production and Sale of Clove Cigarettes*, Report of the Appellate Body (24 April 2012) WT/DS406/AB/R, paras 182, 215; *US–Tuna Products* (n 99) paras 214–15; *US–COOL* (n 103) para 271.

106 Thomas Cottier and others, 'The Jurisprudence of the World Trade Organization' (2013) 3 SRIEL 507–521.

107 See Working Party on Domestic Regulation, 'Necessity Tests in the WTO – Note by the Secretariat' (18 January 2011) S/WPDR/W/27/Add.1 and S/WPDR/W/27 (2 December 2003).

108 Annex A.5 to the SPS Agreement.

109 See fn 3 to the SPS Agreement; WTO, *Australia–Measures Affecting Importation of Salmon*, Report of the Appellate Body (6 November 1998) WT/DS18/AB/R, para 180; WTO, *Australia–Measures Affecting the Importation of Apples from New Zealand*, Report of the Appellate Body (17 December 2010) WT/DS367/AB/R, para 344; WTO, *India–Measures Concerning the Importation of Certain Agricultural Products*, Report of the Appellate Body (4 June 2015) WT/DS430/AB/R, paras 5.203–5.206.

to Article XX GATT.[110] The appropriate level of protection refers to an objective pursued, determination of which is a prerogative and an obligation of the WTO Member.[111] WTO panels and the Appellate Body clearly distinguish between the SPS measure itself and the objective pursued by means of this measure.[112] Moreover, they are required to identify the appropriate level of protection based on all available evidence on the record, meaning that there is no automatic deference to the description of that level of protection by the WTO Member.[113] Finally, the necessity of the measure also relates to the risk assessment according to Article 5.1 of the SPS Agreement.[114]

5.3 *Proportionality in Trade Remedies and Enforcement*

5.3.1 Unilateral Countermeasures and Proportionality

In the field of trade remedies, WTO law allows Members to resort to unilateral countermeasures in response to the 'unfair' conduct (anti-dumping and subsidies) or 'fair' but economically injurious conduct (safeguards) according to strictly prescribed rules, including considerations of proportionality.[115]

Article 5.1 of the Agreement on Safeguards establishes that a safeguard measure is to be applied only to the extent necessary to prevent or remedy a serious injury.[116] Here the key question is 'whether the permissible extent of a safeguard measure is limited to the injury that can be attributed to increased imports, or whether a safeguard measure may also address the injurious effects caused by other factors'.[117] The Appellate Body in *US–Line Pipe* found that safeguards have to remedy serious injury attributed to increased imports and not to other factors.[118] It further explicitly recognised the existence of proportionality as a customary principle of international law and referred the parties

110 Andrew D Mitchell, *Legal Principles in WTO Disputes* (CUP 2008) 201.

111 *Australia–Salmon* (n 109) para 199; *India–Agricultural Products* (n 109) para 5.221.

112 *India–Agricultural Products* (n 109) para 5.204.

113 ibid para 5.221.

114 Desmedt (n 80) 455; see eg *India–Agricultural Products* (n 109) paras 5.14–5.29.

115 Art 9 of the Anti-Dumping Agreement; art 19 of the SCM Agreement; art 2.1 of the SG Agreement. For the distinction between these three types of remedies see WTO, *Argentina–Safeguard Measures on Imports of Footwear (EC)*, Report of the Appellate Body (12 January 2000) WT/DS121/AB/R, para 94.

116 See art 4.1(a) of the SG Agreement.

117 WTO, *United States–Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Report of the Appellate Body (8 March 2002) WT/DS202/AB/R, para 241; Yong-Shik Lee, *Safeguard Measures in World Trade: The Legal Analysis* (Kluwer Law International 2005) 96.

118 *US–Line Pipe* (n 117) para 260.

to the ILC Draft Articles on States Responsibility and to the ICJ jurisprudence.[119] The 'necessity' test resembles here the narrow approach to 'necessity' under Article XX GATT, with specific emphasis on economic considerations, and to this extent draws upon the principle of proportionality.

The Agreement on Subsidies and Countervailing Measures (SCM Agreement) instead refers to the appropriateness of the countermeasures with respect to prohibited subsidies and commensurateness referring to actionable subsidies under the SCM Agreement.[120] Footnotes 9 and 10 of the SCM Agreement clarify that 'appropriate' 'is not meant to allow countermeasures that are disproportionate in the light of the fact that the subsidies dealt with under these provisions are prohibited'.[121] The Appellate Body in *Brazil–Aircraft* clarified that 'appropriateness' does not require the equivalence of the countermeasures in respect to injury; however, proportionality considerations are undeniably relevant here.[122]

5.3.2 Withdrawal of Concessions

In cases where as a result of the dispute settlement proceedings a mutually agreed solution between the parties was reached, however the non-compliant party fails to bring its measures into compliance with this decision, the DSU allows as a 'last resort solution' the suspension of the concessions or other obligations towards a non-compliant party, upon the authorization from the DSB.[123] Other than in general public international law, a Member of the WTO is not entitled to unilaterally assess countermeasures in reply to WTO violations prior to clearance by the WTO Dispute Settlement Body. The DSU specifies that '[t]he level of the suspension of the concessions or other obligations authorized by the DSB shall be equivalent of the level of nullification or impairment'.[124] Thus, the authorization of the remedies by the DSB mainly relies on considerations of proportionality. Unlike in customary international law, where proportionality analysis is focused on the gravity of a wrongful act,

119 ibid para 259 and fn 257.

120 Arts 4.10, 4.11, 7.9 and 7.10 SCM Agreement; see Desmedt (n 80) 451; Hyo-Young Lee, '"Remedying" the Remedy System for Prohibited Subsidies in the WTO: Reconsidering Its Retrospective Aspect' (2015) 10 Asian Journal of WTO and International Health Law and Policy 433–37.

121 See also WTO, *United States–Tax Treatment for 'Foreign Sales Corporations'* (*Article 22.6 – US*), Decision by the Arbitrator (30 August 2002) WT/DS108/ARB, paras 5.17–5.18.

122 WTO, *Brazil–Export Financing Programme for Aircraft* (*Article 22.6 – Brazil*), Decision by the Arbitrators (28 August 2000) WT/DS46/ARB, para 3.51.

123 Article 22.1 of the DSU.

124 ibid art 22.4.

for WTO purposes the economic effect of a wrongful act (injury) plays a key role in the choice of an 'equivalent' countermeasure.[125]

In *EC–Bananas III* (*Article 22.6 – EC*) the Arbitrator referred to the requirement of 'equivalence' under Article 22.4 and 22.7 DSU and to the general principle of international law of proportionality of countermeasures reflected in the ILC Draft Articles on States Responsibility[126] in order to assess whether the double-counting of the same nullification and impairment by different complainants is possible.[127] In *US–Cotton Yarn*, the Appellate Body further confirmed that WTO law, namely through the application of Article 22.4 DSU, excludes the application of disproportionate and thus punitive damages.[128]

5.4 *How Much Proportionality in WTO Law?*

The precise status and function of proportionality in assessing exceptions in pursuit of legitimate policy goals is difficult to assess. Neither the WTO covered agreements, nor the WTO jurisprudence give an explicit answer to the question whether the principle of proportionality as a general principle of law forms part of WTO law.[129] Other than human rights, countermeasures and the law of the sea, WTO is neither exclusively vertical nor exclusively horizontal, but of a mixed constellation.

The case law of WTO does not follow the trias of fitness and suitability, necessity and proportionality *stricto sensu* but is rather informed by an overall process of weighing and balancing interests in assessing the compatibility of the measures with WTO law, essentially attached to the term of necessity and

125 Mitchell (n 80) 999, 1000–04; Desmedt (n 80) 448.

126 Article 49 of the ILC Draft Articles as adopted in the first reading in January 1997 reads: 'Countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the international wrongful act and the effects thereof on the injured State'.

127 WTO, *European Communities–Regime for the Importation, Sale and Distribution of Bananas* (*US*) (*Article 22.6 – EC*), Decision by Arbitrators (9 April 1999) WT/DS27/ARB, para 6.16.

128 WTO, *United States–Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, Report of the Appellate Body (8 October 2001) WT/DS192/AB/R, para 120.

129 Gabrielle Marceau and Joel Trachtman, 'A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade' (2014) 48(2) JWT 368–82. See Mads Andenas and Stefan Zleptnig, 'Proportionality: WTO Law: In Comparative Perspective' (2007) 42(3) TILJ 371, 415–16, who suggest that proportionality under Article XX (both under necessity requirement and chapeau) in combination results in a 'more refined and structured' proportionality analysis than in EC law, Interstate US law or general public international law.

derived therefrom. The scope of proportionality applied in the WTO varies, depending on the wording and the context of the specific provisions.

Interestingly, the approach of balancing and weighing different factors at stake much resembles the methodology of equity developed in the law of the sea, applying different equitable principles and relevant circumstances in a process of weighing and balancing different factors at stake, geographical and human.[130] It is conceivable to structure the operation of interpretation of necessity in line with the three tier test set out above. Measures could be assessed whether they are suitable, necessary and only then engaging in an overall balancing of interests at stake. Yet, whatever approach is chosen, the heart of the matter lies with the perception of deference of WTO law towards its Members and their sovereign right to regulate.[131] It has been argued and claimed that the weighing and balancing 'intervenes too greatly in national regulatory autonomy'.[132] This points to a concern with standards of review and the general function of panels and the Appellate Body which cannot be simply captured in terms of proportionality. Rather – like in the human rights field and countermeasures – it is again a matter of properly assessing the proper role and function of an international adjudicator in this field of international economic law. The present methodology applied in WTO obliges Members to give careful consideration in shaping the scope and architecture of measures designed while allowing for sufficient deference by panels and the Appellate Body in the context of the facts of a particular case. In result, proportionality considerations create the necessary checks and balances to avoid excessively restrictive measures. Therefore, it is submitted that the general principle of proportionality is implicitly recognised in WTO law and has been tailored to the special needs of the international trade environment, taking into consideration the nature of WTO law as a *sui generis*, but not self-contained regime. Proportionality in WTO law can be seen as a guiding principle and flexible tool to guide judicial inquiry into the lawfulness of domestic measures. Essentially, it is a guarantee against the abuse of rights, which in turn – and again – is founded in equity.

130 Cottier (n 59) 614–34 and passim.

131 Van den Bossche (n 79) 284.

132 Gabrielle Marceau and Joel Trachtman, 'The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade' (2002) 36(5) JWT 850–51. The critics mainly refer to discretion with respect to determining the value of a specific national policy goal in line with *Brazil-Retreaded Tyres*.

6 Proportionality in Investment Law

As a result of worldwide bilateral negotiations of a patchy but extensive framework of international investment agreements (IIAs), and the recent escalation in the use of investor–State arbitration procedures included in IIAs, investment has become one of the most prolific areas of international economic law. It potentially is of particular importance for the doctrine of proportionality in international law. The application of IIAs, and treaty-based litigation has revealed a fundamental tension arising between two competing objectives. On the one hand, there are the various guarantees of protection that IIAs seek to provide to foreign investors. On the other hand, there are the regulatory powers that host States can and should exercise in pursuit of legitimate public policies. It is in the context of this intrinsic tension and the need to balance different interests at the heart of IIAs that the principle of proportionality is relevant.

6.1 *The Increasing Relevance of BITs*

Until recently, the use of the proportionality principle as an analytical tool to interpret IIAs has been relatively limited in the practice of treaty-based investor–State disputes. Few tribunals have explicitly invoked the proportionality principle in their analysis; and very few have attempted to follow a rigorous, step-by-step analytical procedure developed mainly by the jurisprudence of domestic courts.[133]

However, this has been gradually changing. Arbitration tribunals have begun to apply proportionality analysis in configurations where the regulatory interests of host States have to be balanced vis-à-vis certain investment protection guarantees provided to foreign investors in IIAs. Some newer BITs and IIAs explicitly refer to the principle of proportionality, which will likely increase the use of proportionality-analysis in investment disputes in the future.[134]

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133 See supra Part 2. See Xiuli Han, 'The Application of the Principle of Proportionality in Tecmed v Mexico' (2007) 6(3) Chinese JIL 635, 636; Benedict Kingsbury and Stephan W Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Administrative Law' New York University Public Law and Legal Theory Working Papers (2009) 29.

134 Eg ASEAN Comprehensive Investment Agreement (signed 26 February 2009 entered into force 29 March 2012) art 11:2(b) <www.asean.org/storage/images/2013/economic/aia/ACIA_Final_Text_26%20Feb%202009.pdf>; US-South Korea Free Trade Agreement (signed 30 June 2007, entered into force 15 Marc 2012) annex 11-B, art 3:b <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2542>; New Zealand-China Free Trade Agreement (signed 7 April 2008, entered into force 1 October 2008) annex 13, arts 4 and 5 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2564>; Comprehensive

An embryonic application of the principle of proportionality in the context of international investment law has taken place in three specific contexts. Firstly, it shows in the determination as to whether a particular regulatory measure constitutes a *de facto* expropriation. Secondly, it shows whether a government action constitutes a violation of the fair and equitable treatment standard (FET). And thirdly, it shows in the case of determining the correct applicability of clauses providing a general exception on public order and essential security interests. In particular, practice has focused on the application of various claims submitted by US investors against Argentina under the bilateral investment treaty (BIT) between Argentina and the United States. More recently, the principle of proportionality was also referred to by establishing the right severity of a sanction.[135]

In the investment context, the principle of proportionality entails a method of legal interpretation that is potentially suitable in situations of collisions or conflicts of interests of investors and of public policy objectives.[136] For adjudicating disputes which involve conflicts between the legitimate interests of investors and competing public policy goals, proportionality has been considered the most appropriate analytical tool and procedure.[137] Yet, here as elsewhere, there are differences between the various versions and methodologies of proportionality analysis. While they all represent a guiding structure for decision-makers in determining whether measures taken by public authorities have sufficiently taken into account the rights and interests of the subjects affected by those measures,[138] not all aspects of IIAs are suitable for proportionality analysis.

Economic and Trade Agreement (signed 30 October 2016, not yet in force) art 8.12 (CETA) <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/08.aspx?lang=eng> all accessed 23 March 2017. See also Anne Peters, 'Proportionality as a Global Constitutional Principle' MPIL Research Paper Series No 2016–10 (2016) 4–5; Carmen Martinez Lopez and Lucy Martinez, 'Proportionality in Investment Arbitration and Beyond: An "Irresistible Attraction"?' (2015) 2 BCDR International Arbitration Review 261.

135 *Occidental Petroleum Corporation, Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No ARB/06/11, Decision on Annulment (2 November 2015).

136 Kingsbury and Schill (n 133) 21.

137 Alec Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' Yale Law School, Faculty's Scholarship Series Paper 69 (2010) 2.

138 Kingsbury and Schill (n 133) 28.

6.2 *Regulatory Takings*

Two types of expropriation covered by IIAs are distinguished: direct and indirect expropriations. In the case of direct expropriation (formal transfer of property rights), compensation is due, independent of the cause for the expropriation. In the case of indirect expropriation, and particularly in the case of regulatory takings, the situation is more complex: regulatory takings raise a conflict of interests between the regulatory interests of host governments and the investment protection interests of the investors.[139] They show comparable problems of weighing and balancing, equally encountered in human rights and WTO law.[140]

Under international law, not all regulatory interferences with property rights constitute an expropriation, and thus do not have to be compensated. In this regard, the Iran-US Tribunal (IUSCTR) held in *SEDCO*[141] that:

> [i]t is also an accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide 'regulation' within the accepted police power of states.[142]

However, both doctrine and investment arbitration practice have considered that in certain circumstances, public regulation may lead to *de facto* expropriations and thus regulatory takings. The NAFTA Tribunal in *SD Myers*,[143] for example, stated in a case concerning temporary export provisions of dangerous waste:

> [t]he general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be subject of legitimate complaint under Article 1110 [the norm regulating expropriations] of the NAFTA, although the Tribunal does not rule out that possibility.[144]

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139 Ursula Kriebaum, 'Privatising Human Rights: The Interface Between International Investment Protection and Human Rights' in August Reinisch and Ursula Kriebaum (eds), *The Law of International Relations – Liber Amicorum Hanspeter Neuhaus* (Eleven International Publishing 2007) 165, 178.

140 See supra ss 2 and 5.

141 *SEDCO Inc v NIOC*, Award (24 October 1985) 9 IUSCTR 249.

142 ibid 275.

143 *SD Myers, Inc v Government of Canada*, Partial Award (13 November 2000) (2001) 40 ILM 1408.

144 ibid para 281.

Two doctrines dominate the jurisprudence of international arbitral tribunals on indirect takings: (i) the 'sole-effects' doctrine under which the sole determining factor in deciding whether an indirect expropriation has occurred is the effect of the governmental measure on the investment. (ii) The 'police-powers' doctrine, under which a range of other factors such as the purpose and context of the measure, the character of the measure and the interference in legitimate expectations of the investor, are considered.[145]

In *Tecmed*,[146] the investment arbitration tribunal explicitly invoked the proportionality principle for the first time, leading to a combination of the two doctrines. The tribunal attributed considerable weight to the effects of the measure, but also pondered additional factors when deciding whether a de facto expropriation had taken place. The authorities had refused to renew an operating permit for a waste landfill. The ICSID tribunal found that this failure constituted an expropriation. It also held that limitations on the use and enjoyment of benefits related to the property of permanent nature based on their actual effect can amount to a deprivation of such property, whereas the intention of the government is not decisive. Following the examination of the impact of the measure upon the investment, the Tribunal assessed whether the impact of the interference was proportional to the aim of the measure and to the investment protection granted.[147] The determination as to whether the facts corresponded to a *de facto* expropriation was based on a two-step analysis. Firstly, the tribunal determined whether the State's measure itself was sufficiently intense for a non-compensable regulation to turn into a compensable indirect expropriation. In this regard, it found that the waste disposal facility could not be used for a different purpose and could not be sold because of the pollution of the property. Secondly, the tribunal considered the effects of the non-renewal of the licence as only one factor among other aspects like the legitimate expectations of the investor, the importance of the regulatory interest pursued by the host State, the weight and the effect of the restriction, and other circumstances.[148] The Tribunal ultimately found that the measure was not proportional.

In conclusion, the proportionality test was applied to find out whether an expropriation had in fact taken place or not. A similar approach was later

145 Kriebaum (n 139) 180; Kingsbury and Schill (n 133) 32.

146 *Tecnicas Medioambientales Tecmed SA v The United Mexican States*, Award (29 May 2003) (2004) 43 ILM 133.

147 ibid para 122, footnotes omitted.

148 Kingsbury and Schill (n 133) 33–35.

adopted in *LG&E* and in a few other cases.[149] However, the proportionality principle has still not become widely used by investment arbitration tribunals in the determination of *de facto* expropriations.

6.3 *Application of the Fair and Equitable Treatment Standard*

The 'fair and equitable treatment' standard (FET) in investor State arbitration is generally worded in very vague terms. It basically provides the investor with an absolute standard of protection independent from the host country's domestic legislation. It does not entail an obligation of result, but rather an obligation of conduct on the part of the host government when implementing administrative or legislative measures which may affect the foreign investors. Due process, transparency, stability in the regulatory framework and the protection of the investor's legitimate expectations, constitute the main elements that investment arbitration ascribes to FET. Within this context, FET often leads to situations where the proportionality principle can be useful to balance tensions between an investor's rights and a State's legitimate interest in regulating for the public good.[150]

FET is particularly relevant for the protection of the investor's legitimate expectations. Because not every change of the domestic legal framework can result in the State's obligation to pay the investor compensation, a test is needed for balancing the different interests at stake. In *Saluka*, the tribunal warned about taking the idea of investor's expectations too literally, as this would impose unrealistic obligations upon States.[151] The tribunal set out to balance the interests of the investor and the interests of the State within a broader proportionality test:

> No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. ... [T]he determination of a breach of Article 3.1 by the Czech Republic therefore requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory

149 *LG&E Energy Corp, LG&E Capital Corp, LG&E International, Inc v Argentine Republic*, ICSID Case No ARB/02/1, Award (25 July 2007). See on proportionality analysis in the cases of indirect expropriation Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration' (2012) 15(1) JIEL 223.

150 Sweet (n 137) 13–14.

151 *Saluka Investments BV (The Netherlands) v The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) para 305.

> interests on the other. A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, as far as it affects the investor's investment, reasonably justifiable by public policies and that such conduct does not manifestly violate requirements of consistency, transparency, even-handedness and non-discrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.[152]

This approach has been endorsed by various tribunals.[153] However, the concept of 'investor's legitimate expectations' as part of FET has been criticized by scholars, in part as a consequence of the heated public debate on policy space for States in investor-State arbitration. Some authors argue that the concept of the 'investor's legitimate expectations' as part of FET is in fact an arbitral innovation and lacks sufficient legal basis in BITs and IIAs. Applying proportionality-analysis to establish the scope of the 'investor's legitimate expectations', according to this view, is not sufficiently legitimised by treaty-law.[154] This is notable, since the inclusion of proportionality analysis in investment arbitration itself is not seen as problematic in the literature: to date, proportionality analysis is widely accepted by authors on investment law as a general principle of international law developed and applied by judges in other courts. While applying the proportionality analysis in investment disputes constitutes judicial law-making and recourse to a general principle of law, it is generally accepted that as such it is sufficiently legitimised by case law and general practice.[155]

Tribunals also increasingly link proportionality with concepts of reasonableness. The cases of *Pope & Talbot*[156] and *Eureko*[157] both imported a general

152 ibid paras 305 et seq.

153 See *BG Group Plc v The Republic of Argentina*, UNCITRAL, Final Award (27 December 2007) para 298; *Marvin Feldman v Mexico*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002) para 111.

154 See eg Christopher Campbell, 'House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Law' (2013) 30 J Intl Arb361.

155 Alec Stone Sweet and Giacinto Della Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: Response to José Alvarez' (2014) 46 J Intl L & Pol 911.

156 *Pope & Talbot Inc v Government of Canada*, NAFTA Interim Award (26 June 2000) (Media Copy) para 68.

157 *Eureko BV v Republic of Poland*, Partial Award (19 August 2005) para 233.

concept of reasonableness into specific interpretations and applications of FET. On the other hand, proportionality-related analysis can also be relevant in establishing whether the exercise of administrative discretion conforms to FET.[158] In *Middle East Cement*,[159] a key question was whether the procedural implementation of an auction was valid, particularly, whether sufficient notice of the seizure of the auctioned ship was given. Relying on the FET in interpreting the due process requirement in the expropriation provision of the Greece-Egypt BIT, the tribunal reasoned that a direct communication on such an important matter would be necessary whether or not there is a respective obligation or commercial practice.[160] Kingsbury and Schill state in this context, that, without formulating it explicitly, a proportionality analysis was applied by weighing the importance of investment protection, the legitimate government interest pursued, and the fact that less restrictive but equally efficient options were available.[161]

In 2012, the proportionality test was finally explicitly applied in *Occidential Petroleum v Ecuador*.[162] The award was celebrated as ground-breaking, since it officially established the proportionality test as a part of the analysis of fair and equitable treatment.[163] The tribunal stated that 'the obligation for fair and equitable treatment has on several occasions been interpreted to import an obligation of proportionality'.[164] The ICSID decision remains controversial since the Tribunal awarded a record high amount of damages to the investor while one member of the Tribunal was in complete disagreement with the majority of the arbitrators.[165] However, the fact that the Tribunal found a violation of the relevant laws based on the proportionality test was not disputed. It has nevertheless been criticized that the use of the proportionality test tends to favour the interests of the investor vis-à-vis the host country. Therefore,

158 See Kingsbury and Schill (n 133) 38.

159 *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award (12 April 2002).

160 ibid para 143.

161 Kingsbury and Schill (n 133) 39.

162 *Occidental Petroleum Corp, Occidental Exploration and Prod Co v Republic of Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012).

163 See Christian Leathley and Alejandro Garcia, 'Record Award Against Ecuador Demonstrates Willingness of Tribunal to Review State Decisions on Ground of Proportionality' Herbert Smith Freehills Dispute Resolution, Arbitration Notes (15 October 2012) <www.lexology.com/library/detail.aspx?g=2832ab9a-1bda-4c89-9cf5-50c9bbec265c> accessed 23 March 2017.

164 *Occidental v Ecuador* (n 162) para 404.

165 ibid, Professor Brigitte Stern's Dissenting Opinion (20 September 2012) para 1.

commentaries suggest that the future development of the proportionality analysis under the fair and equitable treatment standard include better protection of the host country's policy choices.[166]

6.4 *General Exceptions on Public Order and Essential Security Interests*

Finally, the embryonic application of the principle of proportionality has taken place is in the determination of the correct invocation of clauses providing general public order or essential security exceptions in IIAs. The 1990s in Argentina were marked by deep market-oriented reforms, leading to a significant influx of foreign investment. In the early stages the negotiation of contracts occurred with extensive involvement of public authorities in a number of sectors, including utilities. The Argentinean Peso was pegged to the US dollar to ensure economic stability in the country. During the years 1999–2002 the Argentinean economy suffered from a major economic meltdown, which resulted among other things in the devaluation of the currency. This in turn led to the devaluation of investments based on the initial exchange rate. The modification of the regulatory regime resulted in a wave of claims submitted to investor–State arbitration by US and European investors under their respective BITs.[167]

The BIT between Argentina and the United States, includes Article XI which reads as follows:

> This Treaty shall not preclude the application by either party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[168]

Consequently, if measures undertaken by the Argentinean Government during the crisis meet the requirements outlined in Article XI, they do not breach rights provided to investors in other parts of the BIT. Thus, not surprisingly,

166 Anne Marie Martin, 'Proportionality: An Addition to the International Centre for the Settlement of Investment Dispute's Fair and Equitable Treatment Standard' (2014) 37(3) BC Intl & Comp L Rev 58, 68.

167 Sweet (n 137) 19–20.

168 Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (signed 14 November 1991, entered into force 20 October 1994) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/127> accessed 23 March 2017.

in many cases, Argentina invoked Article XI as a defence against the claims submitted by foreign investors.

Arbitration tribunals have been quite inconsistent in their approaches towards evaluating the question of the legitimacy of measures necessary for the preservation of public order and security. Sweet argues that the proportionality test would be the best-practice standard for dealing with normative conflicts like the ones posed by a clause like this.[169] However, arbitration tribunals have tended to ignore proportionality. Among several awards CMS[170] (May 2005), *Enron*[171] (May 2007), *LG&E*[172] (July 2007), *Sempra*[173] (September 2007), and *Continental Casualty*[174] (September 2008), only the last one undertook an explicit analysis of proportionality. In *Continental Casualty*,[175] the tribunal accepted the plea of Argentina under Article XI of the BIT and adopted a mature form of proportionality analysis. The test applied was the one developed by the GATT panels and the Appellate for dealing with derogations to the GATT permitted under Article XX of that agreement.[176]

The tribunal began with establishing whether Article XI was applicable to the dispute. It ruled that significant economic and social difficulties may also require governmental actions to restore civil peace and the normal life of society, which correspondingly will fall under Article XI.[177] The tribunal itself then adopted the standards and methodology used by WTO to adjudicate the necessity plea under Article XX GATT. The tribunal quoted the classic case *Korea–Beef*[178] and stated that it is well-established that 'necessary' refers more to an 'indispensable' measure than to a measure 'making a contribution'.[179] The tribunal finally turned to the analysis of necessity itself and quoted extensively from *Brazil–Retreaded Tyres*, recalling the tree factors to be balanced: The

169 Sweet (n 137) 2.

170 *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No ARB/01/8, Award (12 May 2005).

171 *Enron Corporation Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3, Award (22 May 2007).

172 *LG&E v Argentine Republic* (n 149).

173 *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award (28 September 2007).

174 *Continental Casualty Company v The Argentine Republic*, ICSID Case No ARB/03/9, Award (5 September 2008).

175 Sweet (n 137) 22.

176 ibid 23. See supra Section 5.1.

177 *Continental Casualty* (n 174) para 174.

178 *Korea–Beef* (n 88).

179 ibid para 161 reprinted in *Continental Casualty* (n 174) para 193.

relative importance of interests, the contribution of the measure to the realization of the ends, and the restrictive impact of the measure on international trade.[180]

The tribunal then assessed the state measures under review with regard to a long list of alternatives. With one minor exception, the tribunal found that Article XI indeed covered Argentina's measures. In January 2009, Continental Casualty asked that an annulment committee be constituted.[181]

Through the *Continental Casualty* decision, proportionality has made a significant entrance into treaty-based investment arbitration. As the necessity defence is likely to become a regular feature of investor–State arbitration (particularly in times of economic and financial crisis), tribunals are likely to further embrace the proportionality framework in the future. At the same time, it is likely to attract criticism similar to that in the debate on WTO law addressing the balance of powers between government and international courts of arbitration in reviewing governmental policies. Indeed, Sweet and others suggest that this explains the earlier reluctance to engage in proportionality in former cases:

> To adopt proportionality-style necessity analysis would place arbitrators in the position of the balancing judge as perhaps something quite different than arbitrators traditionally conceived.[182]

Despite such concerns, a growing sector of the doctrine has started to advocate the use of proportionality analysis as a potential instrument not only to foster the development of sound international investment law jurisprudence, but also to deal with the eroding legitimacy of the international investment regime resulting from inconsistent case-law based on not always clear and sophisticated legal reasoning. Kingsbury and Schill argue that proportionality analysis seems to be more rational and profound than the '"I-know-it-when-I-see-it" type of reasoning', thus improving the accountability of arbitrators. Moreover, it allows the non-investment-related interests of the third parties that will be affected by the decision to be taken into account.[183]

Possibly, the invocation of the proportionality analysis in investment disputes will also continue because of the increasing awareness of conflict of interests between democratically legitimised policy interests and investor

180 *Continental Casualty* (n 174) para 194 quoting *Brazil–Retreaded Tyres* (n 90) para 164 in full.

181 Sweet (n 137) 24.

182 ibid 22.

183 ibid 40.

protection and the inclusion of proportionality considerations in most recent IIAs and BITs. One way to ensure that IIAs remain in place is to give more weight to democratically legitimised policy decisions, through a thorough proportionality analysis. Insofar, proportionality enjoys a key role with respect to the future development of the interpretation of IIAs.

In conclusion, proportionality in investment protection increasingly attempts to balance the different and competing legitimate interests involved. It is comparable to the problems and the methodology developed in WTO law. It is particularly interesting that the protection of legitimate expectations – an emanation of good faith – is critically discussed in terms of proportionality and balancing rights and obligations in this field of law. Again, it is a field which cannot be clearly allocated to horizontal or vertical functions, but combines the two, triggering comparable problems found in human rights and WTO law.

7 Assessment and Conclusions

The review of different fields shows that proportionality in international law appears in different forms and variations. Perhaps the most important shared trait relates to legal methodology. Based upon, and similar to the principle of equity, the principle of proportionality does not entail a mechanical application of norms and rules, but seeks reasonable and fair results by taking recourse to factors and criteria which are identified in a particular context and brought to mutual bearing and relations. It is on the basis of such factors of real life that necessity can be assessed and that weighing and balancing of different factors and identified values are undertaken. It stands for the proposition of topical jurisprudence comparable to the one developed by the International Court of Justice in the context of equitable principles of maritime boundary delimitation.[184]

Proportionality stands for a particular method of jurisprudence which can be shared on all layers of governance, including international law. It is inherently based upon a case by case approach, and results cannot be readily generalized. The principle of proportionality cannot readily provide legal security *ex ante* and *in abstracto* on all levels of governance alike. It places the responsibility on those applying and reviewing the operation of the principle.

184 Cottier (n 59) 51 605–10.

7.1 *Foundations in Equity and Scope*

Proportionality in international law finds its roots in the principle of equity, leading to diverging configurations of the principle in different fields of international law. This foundation, inherently linked to the goal of justice to particular configurations of facts and individual cases, excludes a rigid application of the three-tier test developed in domestic administrative law, and essentially focuses on balancing different interests and factors at stake in a particular case. The case law reveals in all areas except maritime boundary delimitation circles around necessity in terms of the means-end relationship and a comparison of the objective and impact of the measure taken. A clear distinction between horizontal and vertical or mixed constellations in international relations cannot be found. Vertical relations are not assessed in fundamentally different ways than horizontal relations. Perhaps there are differences in degree, which relate to standards of review and different roles and different authority of courts discussed below. In all cases, at the end of the day, it is a matter of assessing the impact on persons affected, irrespective of the subject and object of international law directly addressed. The standards found in human rights protection – the spearhead of constitutionalization – can be equally found in assessing countermeasures, humanitarian law, WTO law and increasingly in investment protection. An exception is maritime boundary law where proportionality is limited to avoiding gross distortions and inequitable results. In all other constellations, assessing the relationship of means and ends under a test of least intrusive measure (necessity properly speaking) can be found. Equally, balancing interests at stake in assessing whether the measure itself can be justified in light of its impact on those affected (proportionality *stricto sensu*) can be observed in these areas of the law.

Both necessity and proportionality *stricto sensu* are at the heart of proportionality in international law, yet often without explicit mentioning. This is due to the fact that proportionality, as a technical term, is not firmly anchored in Anglo-American and Anglo-Saxon law – the two legal cultures which have had the strongest influence in public international law since the Second World War. It is not a coincidence that authors sceptical about proportionality often have a common law background. Doctrines of necessity and of reasonableness in common law assume comparable, but not identical functions. It is only more recently, and mainly through international law, that the principle has been discussed, and we witness its gradual acceptance.

In substance, it is conceivable in international law to shape the application of proportionality in line with the three-step test developed in domestic law in terms of a methodology and work programme. Suitability or fitness of a measure will largely be taken for granted, and it is not a coincidence that it is

not examined before international tribunals, including in the field of human rights. We did not find cases addressing this requirement in depth. Indeed, it is not a matter of courts to decide whether legislation or regulation is required. This is a matter for the democratic process to decide. The test of suitability stemming from administrative law in highly centralised systems is not suitable for international law and will be forgone in a system of multilevel democratic governance. The same is true in a federal context. For example, Swiss courts, applying proportionality, do not assess in detail the public interest in enacting a measure, but would intervene only in cases of arbitrary and capricious decisions. Rather, they focus on the means and end relations and the overall impact of the measures, thus applying the second and third element of the proportionality test. In other words, they focus on the modalities of the measure at hand.[185] An assessment of the relationship of means-and-end can be properly placed under the heading of necessity, and the impact of the measure on those concerned could be assessed under proportionality *stricto sensu*, entailing an operation of balancing interests.

The operation of proportionality in a federalist context is therefore not fundamentally different from its operation on the international and regional level, but depends upon the authority and power granted to the respective courts, or claimed by these institutions within the separation of powers. A doctrine of multilevel governance is warranted not only in international law, but also in domestic law rendering governance more coherent overall while taking into account differences on different levels of governance.[186] Proportionality essentially contributes to such coherence.

185 See *Schweizerischer Versicherungsverband v Kanton Glarus*, Swiss Federal Court, BGE 138 I 378, 2C. 485/2010 (3 July 2012).

186 See references in supra n 9 and Thomas Cottier and others, 'Introduction: Fragmentation and Coherence in International Trade Regulation: Analysis and Conceptual Foundations', in Thomas Cottier and Panagiotis Delimatsis (eds), *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (CUP 2011) 1, 33 et seq; Thomas Cottier, 'The Impact from Without: International Law and the Structure of Federal Governance in Switzerland' in Thomas Cottier, Peter Knoepfel and Wolf Linder (eds), *Verwaltung, Regierung und Verfassung im Wandel: Gedächtnisschrift für Raimund E Germann* (Helbing & Lichtenhahn 2000) 213–30; Cottier and Hertig (n 8); Thomas Cottier, 'The Constitutionalization of International Economic Law' in Karl M Meessen and others (eds), *Economic Law as an Economic Good. Its Rule Function and Its Tool Function in the Competition of Systems* (Sellier 2009) 317.

7.2 *How Much Power to Courts of Law?*

The heart of the problem encountered with proportionality is not terminology, its components, the different modes and modalities to relate them to each other, and thus the principle itself. Rather, it is about defining the proper level of deference to governments, the proper standards of review and margin of appreciation granted to government or lower courts.[187] It is about the issue whether courts should entail weighing and balancing at all in assessing governmental measures, and to what extent. Proportionality is a principle of great value and assistance, but it does not and cannot dispense from making value-based judgments one way or the other. And who should be entitled to make these judgments? Not the principle of proportionality is the problem, but its interpretation and application by governments and courts of law and the responsibility they are supposed to assume. Foremost, the problem of proportionality is a matter of defining the proper role of courts in a system of multilevel governance and of vertical checks and balances.

It is interesting to observe that proportionality is less of a problem and criticised in classical and horizontal areas of international law, subject to voluntary dispute settlement and weak enforcement. It is more of a problem where international law reviews domestic legislation under mandatory and enforceable systems of dispute settlement. The problem equally exists in the field of human rights, particularly relating to the ECtHR, the CJEU, panels and the Appellate Body of the WTO and tribunals operating under bilateral investment agreements and private-public arbitration.

In the case of WTO law, different forms of proportionality have been seen to exist and may even gain weight in the future as the judiciary continues to establish tests of balancing and weighing in the sense of proportionality *stricto sensu*. Proportionality may influence the interpretation of specific

187 There is a wide range of literature on the topic. See Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Options* (CUP 2014); Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012); Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2001); Lukasz Gruszcyinski and Wouter Werner (eds), *Deference in International Courts and Tribunals: Standards of Review and Margins of Appreciation* (OUP 2014), and in relation to economic law see in particular Ernst-Ulrich Petersmann, 'Judicial Standards of Review and Administration of Justice in Trade and Investment Law and Adjudication' in Gruszcyinski and Werner, ibid, 19 and Alexia Herwig and Asja Serdarevic, 'Standards of Review of Necessity and Proportionality Analysis in EU and WTO Law: Why Differences in Standard of Review Are Legitimate' in ibid 209; Matthias Oesch, *Standard of Review in WTO Dispute Settlement* (OUP 2003).

provisions in WTO law, and pose less of a danger to WTO Members pursuing legitimate policy choices than some other, vaguely defined tests would. But it was seen that there is considerable concern about the question, whether the WTO judiciary should be balancing at all. While some believe that the WTO will eventually develop its own form of proportionality test (because it is unavoidable to have a proportionality test established in a law which embodies conflicts of interest), others urge the WTO DSB to abandon balancing (because the DSB is not entitled to do so and the WTO system is not yet sufficiently democratic).

WTO law is of particular importance in assessing proportionality both in horizontal and vertical relations because it is subject to mandatory dispute settlement and enforcement. Panels and the Appellate Body are called upon to assess whether State conduct amounts to nullification and impairment of benefits under the DSU, a task mainly consisting of assessing the legality of trade-related measures. The role of proportionality is therefore closely linked to rules and principles of treaty interpretation, standards of review and, more broadly, the position and role of judicial dispute settlement within the multilateral trading system. The agreement stipulates that 'recommendations and rulings of the Dispute Settlement Body cannot add to or diminish the rights and obligations provided in the covered agreements'.[188] Panels and the Appellate Body have consistently interpreted the text of the agreements primarily 'in accordance with the ordinary meaning of the words of the treaty'.[189] They follow the customary rules of treaty interpretation embodied in Article 31 of the Vienna Convention on the Law of Treaties. Practice is characterized by strong adherence to textual and contextual interpretation.[190] They seek to refrain from judicial activism. Thus, in possibly applying proportionality and thus in weighing different rights and interests, panels and the Appellate Body are careful not to alter existing rights and obligations under the WTO Agreements. This framework sets the stage for the potential operation of proportionality in trade regulation: it is inherently linked to the powers and functions of panels and the Appellate Body. Extensive or restrictive recourse to proportionality directly affects and defines such powers in assessing governmental action.

188 Arts 3.2 and 19.2 of the DSU.

189 See eg Peter Van den Bossche, 'From Afterthought to Centerpiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System' Maastricht Faculty of Law Working Paper 2005/1 (2005) 1.

190 See also Desmedt (n 80) 442.

The problem is similar in investment protection. Operators enjoy the right to investor–State arbitration, and tribunals are called upon to assess rights and obligations of States and private parties directly under a particular agreement. Investment dispute settlement is opening up towards a more active role of proportionality and potentially a three-tier test developed in administrative law and human rights protection. In the future, this trend may well spread to the areas of prevention and conciliation. The restrictions imposed upon the investors in pursuit of legitimate policy goals may be assessed using this approach and methodology. But this may be considered to be too intrusive both in the rights of investors and of governments alike, given limited legitimacy of international arbitration in assessing public policy.

Like in trade, governments are equally obliged to engage in dispute settlement, and legitimacy and compliance largely depend on whether the ruling remains in line with the text and purpose of the agreement in accordance with the principles of treaty interpretation. The reluctance to embrace the language and rhetoric of proportionality, in the absence of positive law, may in substance be founded in the concern that proportionality, applying predominant doctrines, results in overall weighing and balancing, which in the end will erode market access and non-discrimination and give way to almost any competing government policy. The same is true for the risk of eroding investment protection and that of human rights.

It should be recalled that the full principle of proportionality originates in domestic law assuming powerful constitutional courts entitled to review governmental policies. International courts, including human rights courts, are more restrained in doing so. Review of necessity in terms of defining appropriate means-to-end relations is well established. More extended review has remained controversial, both in trade and investment, albeit courts are gradually moving towards more broadly defined operations of balancing interests and thus proportionality *stricto sensu*. The factors applied in trade regulation and investment protection comprising the relative importance of the interests and values at stake, the contribution of the measure to achieve the regulatory goals and the impact of the measure on trade and investment, respectively, are closely related, albeit not identical, to the criteria of necessity and appropriateness referred to in administrative law. They allow for more flexibility and thus take into account the different scope of international courts and tribunals compared to domestic courts. Again, it should be recalled that the problem of judicial review is not limited to international law, but is of general nature. Constitutional law in federal States shows similar problems of defining how to review value judgments.

7.3 *The Legal Nature of Proportionality*

Given the role of proportionality as a legal principle in different legal orders, it clearly amounts to a legal principle recognized in international law under Article 38 of the Statute of the ICJ, essentially derived from the tradition of equity. The question arises whether it also amounts to a principle in customary international law, thus reaching beyond a principle supporting the application and interpretation of the law in a particular context.

It is submitted that proportionality in terms of necessity, i.e. the reasonable relationship between end and means and exclusion of excessive measures qualifies as a rule of customary international law beyond the use of force and countermeasures in light of state practice and legal perception. 'You must not use a sledgehammer to crack a nut'. It is well understood, widely accepted and perceived as a legal principle. It can and should be applied across the board. The prohibition of measures exceeding what is required to attain a particular objective amounts to a fundamental rule of public international law. It is able to apply in its own right. Beyond that, however, the principle assumes different regulatory functions in different contexts, and recognition of proportionality as a general principle of law, and thus of international law, will not bring about uniform and simplified applications beyond the common trait of necessity. The normative difference between customary international law and a legal principle of law is important as the latter does not operate on its own but informs and supports the process of application and interpretation of specific rules.

From this point of view, the term proportionality *stricto sensu* in international law should rather relate to proportionality defining in customary law the relationship of means-to-ends and the obligation to use the least intrusive measures. Suitability and appropriateness should rather be depicted by proportionality in a broader sense pertaining as a general principle of law to specific fields of international law, operating in divergent environments, but not on its own and possibly with different results in supporting the process of interpretation of more specific rules. As to judicial review, it will essentially depend upon the field of law and the authority and jurisdiction of the court concerned. This is particularly true where the principle seeks to assess underlying values or choices and is thus linked to more extended powers of the judiciary. The controversies in WTO and investment law and inherent tensions with positive law offer a pertinent example showing that generalizations cannot be made.

In conclusion, it is not simply a matter of applying a three-tier principle of proportionality, which was developed in a particular constitutional context

and system of separation and balances of power, and which is not identical to the one found in international law. The foundation will, however, allow proportionality to eventually develop its role and function in a more nuanced and settled manner in different fields of international law under the doctrine of multilevel governance, and separation of powers and enhanced judicatory powers under the rule of law. It will ultimately respond more fully to the rules of reasonableness and fairness and thus of equity, returning to the very roots of the principle in international law.